SUPREME COURT, U. S.

NOV 13 1967

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In the

Supreme Court of the United States

OCTOBER TERM, 1967

No. 56

INTERSTATE CIRCUIT, INC.,

Appellant,

v.

CITY OF DALLAS,

Appellee.

No. 64

UNITED ARTISTS CORPORATION,

Appellant,

v.

CITY OF DALLAS,

Appellee.

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

I.

SUMMARY OF ARGUMENT

The City Council of the City of Dallas passed Ordinance No. 11284 on November 22, 1965. This ordinance was applied to the motion picture "Viva Maria" sought to be shown in the City of Dallas by Interstate Circuit, Inc. The Dallas Motion Picture Classification Board under the Ordinance classified it as "not suitable for young persons." The

exhibitor filed notice of non-acceptance. The Board then proceeded to seek an injunction in the trial court, including a finding by the Texas District Court that the motion picture was in fact "not suitable for young persons."

The City of Dallas differs with the Appellants in this case in that we believe that the test as set forth in the *Freedman v. Maryland case*, 380 U.S. 51 (1965) requires a prompt judicial determination in an adversary proceeding before the trial court of proper jurisdiction, but does not require a prompt judicial decision at all levels of appeal or in all of the Appellate Courts. The ordinance makes proper provision for this hearing, and also obligates the Board to waive time limits in seeking a speedy appeal.

The ordinance requires a notice of non-acceptance by the exhibitor before suit is instituted against it. The City contends that this is not unconstitutional.

In defining the phrase "not suitable for young persons" as used in the ordinance, precision is not required beyond reasonable ascertainable standards. The ordinance provides this.

We believe the pronouncements of this Court under the First Amendment to the Constitution, make provision for variable standards of obscenity. In addition we interpret them to mean that there can be a restraint by classification insofar as young persons are concerned short of complete obscenity.

This ordinance as passed by the City of Dallas should not be treated the same as one which completely prohibits the

dissemination of material because it allows presentation of such material to young persons when accompanied by a parent, guardian, husband or wife.

Regardless of whether or not this ordinance was properly applied to the film "Viva Maria", the ordinance itself still sets forth the constitutional standards as enunciated by this Court. We maintain that it was properly applied to this film.

When the interests of the state are properly balanced against the interest of the individual whose sole purpose is to profit from the dissemination of material to young persons, the ordinance should be approved as constitutional.

The Appellee in this brief incorporated its arguments in opposition to that of the Appellant Interstate Circuit, Inc., and of the Appellant United Artists Corporation.

II.

ARGUMENT

1.

ORDINANCE NO. 11284 CONTAINS PROCEDURAL SAFEGUARDS NECESSARY FOR A MOTION PICTURE CLASSIFICATION SYSTEM TO AVOID CONSTITUTIONAL INFIRMITY IN ACCORDANCE WITH THE DECISIONS OF THIS COURT.

(a) Ordinance No. 11284 does grant a prompt judicial decision as required by the Constitution.

This portion is in response to Argument I, pages 11-21 of Appellant Interstate Circuit's brief.

This Court in the case of *Freedman v. State of Maryland, supra*, pointed the way to the drafting of legislation providing for prior restraint of freedom of speech under the First Amendment. At pages 58-59, the Court said:

> "Applying the settled rule of our cases, we hold that a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system. * * * To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film. Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. * * *"

The ordinance in question was drafted pursuant to the requirements set out in the *Freedman* case. It has been reviewed by the United States Court of Appeals for the Fifth Circuit in the case of *Interstate Circuit, Inc. v. City of Dallas*, 366 F. 2d 590 (1966) and by the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas in *Interstate Circuit, Inc. v. City of Dallas*, 402 S.W. 2d 770 (1966). Both Courts held that the provisions of Ordinance No. 11284 authorizing the Dallas Motion Picture Classification Board to classify a motion picture as being "not suitable for young

persons", as well as the provisions for a prompt final judicial review, satisfied constitutional requirements. Each Court relied on the decisions of this Court.

Three days after the exhibitor gave notice of non-acceptance of the classification "not suitable for young persons," this Appellee filed suit in the District Court of Dallas County, Texas. The suit was filed on February 14, 1966, for a temporary and permanent injunction in accordance with the provisions of the ordinance in question, seeking to prohibit Appellant:

> (1) From exhibiting the film "Viva Maria" without advertising the film as "not suitable for young persons," and
>
> (2) From violating Ordinance No. 11284, as amended, by exhibiting any film contrary to the provisions of the ordinance.

On February 16, 1966, United Artists Corporation, also an Appellant herein, intervened in opposition to the City, asserting that it is a distributor of motion pictures and is the exclusive owner of distribution rights of the film "Viva Maria."

On February 18, 1966, following a hearing begun the day before, the Court granted the City's prayer for a temporary injunction. The City offered to try the case on its merits at the same time, that is, try the whole case on February 18, 1966, including the application for permanent injunction. This offer was declined by Appellants; and on March 24, 1966, the Motion to Advance was granted and the case was

submitted to the Court of Civil Appeals on March 28, 1966, and decided on April 5, 1966.

It appears that the real difference between the parties in this case is whether or not this Court, in the *Freedman* case, in talking about the judicial determination to which the exhibitor is entitled, means a prompt adversary proceeding before a court of competent jurisdiction in the first instance, such as the trial court; or whether it means that all of the appellate procedures must be exhausted, *including the appeal to this Court.* We are of the opinion that this Court has said that a prompt judicial review is afforded to the exhibitor and the producer when they have an opportunity to be heard at an adversary proceeding in a de novo trial before a trial court of competent jurisdiction. In this case, the trial court after a hearing, issued its order within *seven days* after the exhibitor gave his notice of non-acceptance of the classification by the Board. To require more than this is beyond the bounds of reason.

There are several reasons why we adopt this interpretation of the Court's opinion in the *Freedman* case. The Court itself indicated this on page 58 when it said:

> "* * * The teaching of our cases is that, because only a judicial determination in an adversay proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint. * * *"

The Court also stated that a model which would be followed is set out in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957). The procedure set out in that case is Section

22-a-2 of the New York Code of Criminal Procedure. This provides:

> "2. The person, firm or corporation sought to be enjoined shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial." (page 438)

There is no provision in the New York Code concerning any further appeal of the adversary proceeding before a Court. This Court upheld the New York provision when it was attacked:

> "* * * Authorization of an injunction pendente lite, as part of this scheme, during the period within which the issue of obscenity must be promptly tried and adjudicated in an adversary proceeding for which '[a]dequate notice, judicial hearing, [and] fair determination' are assured, 208 Misc 150, 164, 142 NYS 2d 735, 747, is a safeguard against frustration of the public interest in effectuating judicial condemnation of obscene matter. * * *" (page 440)

This procedure was upheld as being due process of law, yet nothing was said in the whole procedure about how long it would take to appeal the case through all of the appellate procedures and arrive at a final incontestable decision.

Following the decision in the *Freedman* case, the general assembly of the State of Maryland amended the Maryland statute, and this statute as amended provided for judicial review. In general it provided that the Board, if it disapproved a film, should within three days apply to the Circuit Court seeking a judicial determination as to whether such

film was obscene. The Circuit Court was required, within five days after the filing of said application, to conduct a hearing, view the film, and within two days thereafter enter its decree. The statute went further to say:

> "* * * If the decree or order disapproves said film as being in violation of the provisions of Section 6 hereof, then the person presenting such film for licensing may appeal said determination to the Court of Appeals of Maryland, in accordance with the Maryland Rules of Procedure, and said Court shall advance such case on its hearing calendar to the earliest practicable date; * * *" (Maryland Anno. Code Art. 66A)

No mention is made of the time that an appeal would actually take. No set procedure guarantees to the exhibitor a final decision by the Appellate Court within any period of time.

The new statute was presented to the Maryland Court of Appeals in the case of *Trans-Lux v. Maryland*, 213 A. 2d 235, (1965) and that Court held that the Maryland statutory provision for pre-showing motion picture censorship was constitutional on its face. Additionally, *The United States Law Week* (10/19/65) 34 LW at 2205, reported an excellent analysis of this question in the light of the *Freedman* and *Trans-Lux cases*, which reads in part as follows:

> "The Freedman case does not proscribe all pre-showing censorship but requires that under such a statute the exhibitor be assured that the censor will within a brief period, either issue a license or go to court to restrain showing of the film. Furthermore, Freedman requires that any restraint imposed in advance of a final determination on the merits be limited to preserva-

tion of the status quo for the shortest fixed period compatible with sound judicial resolution.

"The present Maryland statutory plan for pre-showing motion picture censorship meets these constitutional requirements as laid down in Freedman."

Apparently the other Federal Courts are taking the same view of the prompt judicial determination requirement that is being taken by this Appellee; that is, there must be a prompt judicial determination in an adversary proceeding before a court of competent jurisdiction. This does not require any unusual appellate proceedings, although Ordinance No. 11284 does assure to the exhibitor that everything possible will be done to grant it a speedy appellate procedure as well.*

* A summary of the provisions of Ordinance No. 11284, which are material to a prompt judicial review, and as referred to by the Texas Court of Civil Appeals,(402 S.W. 2d 770, 772) are as follows:

Sec. 46A-7. *Judicial Review:*

(a) Within two days after filing of the classification by the Board, any exhibitor may file a notice of nonacceptance. If the Board desires to contest the exhibitor's nonacceptance, it shall:

(1) Make application in court within three days for a temporary and permanent injunction.

(2) Have application for temporary injunction set for hearing within five days. If the exhibitor waives notice pursuant to rules of procedure and requests a hearing on the merits on the day set for the hearing on the temporary injunction, the Board shall be required to waive its application for temporary injunction and shall join in such request.

(3) In the event the exhibitor appeals the City shall reply to appellant's brief within five days.

(4) Same in substance as Paragraph (3) if application for writ is made to Supreme Court of Texas by exhibitor.

(5) If trial court denies the Board's application for injunction and Board appeals, Board shall be required to waive all periods of time allowed it by Texas Rules of Civil Procedure, file motion for new trial only if required and then within two days; shall not amend its motion

The United States Court of Appeals for the Fourth Circuit in the case of *United States v. 56 Cartons Containing 19,500 Copies of Magazines*, 373 F. 2d 635, (1967) gave its analysis of the requirement of a prompt judicial decision in the following words at page 637:

> "Viewed in its entirety, it cannot be said that there was any unreasonable delay. From March 4, 1966, when the cartons were entered, until April 5, 1966, when the District Court filed its formal opinion, or until April 14, 1966, when a formal order in conformity with the opinion was filed, the administrative procedures and the judicial proceedings, together, required little more than a month for a final judicial determination in the District Court of the question of obscenity, including the resolution of the related constitutional questions.
>
> "The answer could not have been had in so short a time had not the matter received the prompt attention of the District Court and had it not given the case great preferential treatment through the scheduling and conduct of the hearing to the filing of an opinion and the entry of the formal judgment."

The time was even greater in the case of *United States v. One Carton Positive Motion Picture Film*, 367 F. 2d 889,

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and shall obtain a hearing within five days. Board shall perfect appeal to Court of Civil Appeals including filing of Transcript, Statement of Facts and brief within ten days and shall then file a motion requesting the Court of Civil Appeals to advance the submission of the appeal.

(6) If the Court of Civil Appeals reverses the trial court's injunction order, or if the court refuses to reverse the order, provisions are made similar to those outlined in Paragraph (5) above for the hearing of and decision by the Supreme Court of Texas.

(b) The Board must secure a favorable judgment from the trial court within ten days or let the film be shown without restriction.

(1967) by the Second Circuit Court of Appeals. The action was instituted on April 22nd and ended on October 21st. The opinion of the Court was issued on November 17th and of this the Court had to say:

> "* * * The judicial action was anything but protracted * * *" (page 904)

While these cases deal with a Federal Statute and the customs control, the same rules apply. There is no reason to assume that one rule would be applicable to Federal procedures and Federal Courts and another rule applicable to State procedures and State Courts. *United States v. One Carton Positive Motion Picture Film*, 247 F. Supp. 450 (1965).

(b) The Dallas Ordinance is not void because it requires a notice of non-acceptance by the exhibitor prior to the institution of suit for a judicial determination.

This is in response to the argument under III A. of Appellant United Artists' brief, pages 51-58. We agree with the Appellant that—

> "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *Freedman v. Maryland, supra.*

We do not agree that the requirement of the Dallas Ordinance of the filing of a "notice of non-acceptance" is unconstitutional. Section 46A-7(a). (R. 128)

The Appellant United Artists Corporation further argues that the City must not only assume the burden of proof, but must file a lawsuit on every film classified "not suitable for young persons", whether there is any disagreement with the exhibitor or not. (Brief p. 55) As authority for this statement it quoted from the *Freedman* case the part which refers to the burden being placed upon the distributor. The only prerequisite required under Ordinance No. 11284 is that the distributor indicate its dissatisfaction with the Board's classification. This notice entails no burden of proof. If a "judicial determination" is desired, a simple notice of disagreement commands the City of Dallas to provide it. It is mandatory that the City of Dallas obtain a speedy judicial determination to prove that the motion picture in question is "not suitable for young persons." The burden of proof is squarely on the City. To require the City to obtain a judicial determination in an adversary proceeding in which the exhibitor did not desire to be an adversary, is the requirement of a vain thing. The Courts have not been prone to do this.

This Appellant cites as authority the case of *Lamont v. Postmaster General*, 381 U.S. 301 (1965) which involved the constitutionality of a Federal statute. That statute required the addressee of mail to request the delivery of certain types of mail by returning an attached reply card. At the same time, the Court pointed out that it would have a deterrent effect to those in sensitive positions. The mail being delivered was not even of obscene or prohibited ma-

terial and would be immediately forwarded upon return of the reply card. The condition imposed in that case is far different from the one in the case at bar because the notice in the Dallas ordinance is a procedure which indicates that a judicial determination is desired by the exhibitor. It is nothing more and nothing less.

The Appellant United Artists Corporation further cites the case of *Garrity v. New Jersey*, 385 U.S. 493 (1967) for the proposition that the Government may not condition its exercise of a constitutional right upon "the exaction of a price." It is hardly proper to refer to a case like that which imposes the loss of a job upon an officer if he refused to answer a question concerning his own guilt to the one like the case at bar and the requirement of the Dallas ordinance. We might point out that there was a very strong dissent in the case.

On page 57 of its brief, Appellant United Artists states that if Interstate had inadvertently neglected to file a notice of non-acceptance of the Board's classification, the showing of "Viva Maria" would have been finally restricted to "not suitable for young persons." They failed to quote to the Court that section of Ordinance No. 11284 which makes provision for a rehearing or a subsequent application:

"Section 46A-3. Classification Procedure:

* * * * *

"(c) Any initial or subsequent exhibitor may file an application for a change in the classification of any film previously classified. No exhibitor shall be allowed to file more than one (1) application for change of classification of the same film. Such

> application shall contain a sworn statement of the grounds upon which the application is based. Upon filing of such application, the City Secretary shall bring it immediately to the attention of the Chairman of the Board, who upon application by the exhibitor shall set a time and place for a hearing and shall notify the applicants and all interested parties, including all exhibitors who may be exhibiting or preparing to exhibit the film. The Board shall view the film and at such hearing, hear the statements of all interested parties, and any [fol. 161] proper testimony that may be offered, and shall within two (2) days thereafter make and file its order approving or changing such classification. If the classification of a film is changed as a result of such hearing to the classification 'not suitable for young persons', the exhibitors showing the film shall have seven (7) days in which to alter their advertising and audience policy to comply with such classification." (R. 125)

If the argument of Appellants is correct, they are simply saying that as a matter of constitutional law, every film that is classified "not suitable for young persons" must be adjudicated to be "not suitable for young persons" by a court of competent jurisdiction. This means that even in the numerous cases that the exhibitor has itself classified a film as "not suitable for young persons", there is a duty upon the Board to take the case to court,—this, in spite of the fact that the exhibitor will not even show up in court, will not be present, or if present, will tell the court, "We agree that it should be so classified." The Constitution of the United States cannot be, and is not, so inflexible as to require such a frivolous and useless procedure.

The Fifth Circuit, United States Court of Appeals in *Interstate Circuit, Inc. v. City of Dallas, supra,* in its decision on this very same ordinance, outlines the steps that must be taken. It noted the exhibitors duty to file a notice of non-acceptance of the Board's classification. Following this the Court held:

> "It seems obvious that this procedure complies with the standards established in *Freedman,* with the only possible objection being the length of time necessary to get a final adjudication on the merits. * * *" (page 600)

This Court has not noted jurisdiction in the writ applied for from that case and that holding.

This Court held in *Times Film Corporation v. Chicago,* 365 U.S. 43, 46 (1961) that the Chicago ordinance requiring the submission of films prior to their public exhibition was not void for this reason. The ordinance required a far more onerous burden than the one provided for in the Dallas ordinance. Therefore, the provision for a judicial determination in Ordinance No. 11284 is in compliance with the interpretation of the Constitution by this Court.

2.

THE STANDARD FOR THE CLASSIFICATION OF MOTION PICTURES AS "NOT SUITABLE FOR YOUNG PERSONS" IN ORDINANCE NO. 11284 IS VALID AND SUFFICIENTLY DEFINITE UNDER THE CONSTITUTIONAL REQUIREMENTS.

Both of the Appellants have advanced the argument that Section 46A-1(f) of Ordinance No. 11284 is vague and in-

definite. This was the same argument that they made before the Texas Court of Civil Appeals in the case of *Interstate Circuit, Inc. v. City of Dallas, supra,* which overruled this argument. They also argued it before the United States Court of Appeals for the Fifth Circuit in *Interstate Circuit, Inc. v. City of Dallas, supra,* which the court overruled with modifications.

We do not have to depend upon the holding of either of these Courts for our standards but need only to look to those standards that have been enunciated by this Court.

This Court in the case of *United States v. Petrillo,* 332 U.S. 1 (1947) held:

> "* * * but the Constitution does not require impossible standards. The language here challenged conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. The Constitution requires no more." (Pages 7-8)

The language there being discussed was the language of the statute which read, "Number of employees needed by such licensee", as it referred to a radio broadcaster in the broadcasting business.

The Dallas ordinance suffciently described the term "not suitable for young persons" to give adequate warning of the conduct proscribed and give a fair test for judge and jury. Many cases by this Court have indicated that a different standard can be applied to the young person than that applied to the adult.

In *Butler v. Michigan,* 352 U.S. 380 (1957) the statute made the distribution to the general public of publications

"tending to the corruption of the morals of youth" a misdemeanor. This Court suggested the probable validity of a statute properly drawn to protect children with restricting the First Amendment rights of adults.

The *Butler* case was followed in a few months by the test and definition of obscenity in *Roth v. United States*, 354 U.S. 476 (1957).

Then in *Jacobellis v. State of Ohio*, 378 U.S. 184, 195 (1964), Justice Brennan in applying the *Roth* test to the "society at large", directed local authorities to aim their laws specifically "at preventing distribution of objectionable material to children rather than at totally prohibiting its dissemination." Note was made of *State v. Settle*, 90 R.I. 195, 156 A. 2d 921 (1959) which turned on a restriction upon the public at large and not on children only. Justice Goldberg joined Justice Brennan. Chief Justice Warren, Justice Clark and Justice Harlan by their observations, would let the state protect children from material not obscene as to adults.

The Court then apparently put its final stamp of approval on variable obscenity in *Ginzburg v. United States*, 383 U.S. 463 (1966) when it rejected the proposition that obscenity is a matter inherent in the material published under all circumstances. This was followed by *Mishkin v. State of New York*, 383 U.S. 502 (1966), deviating from the test of the "average" person and considering the group at which the

material is aimed. In our case this is analogous to the young person to whom the film is exhibited.*

We urge the Court to keep in mind in its decision on this case, the fact that this ordinance is directed to the age-old concept that the parent should be responsible for and should direct the training of the young mind and of the young person. The ordinance provides that when accompanied by its parent, guardian, husband or wife, the child or young person may be admitted to the movie regardless of classification. Up to this time, all of the cases discussed have been concerned with those cases that deal with obscenity as such, and yet on behalf of the public interest and for the protection of the family life and of the training of the young mind, there is something less than obscenity which is a detriment to the community and to the people that live in it. It has been recognized in many other endeavors and this Court has recognized it insofar as the First Amendment freedoms are concerned.

It is not uncommon to find States prohibiting young persons from entering pool halls, from partaking of alcoholic beverages or from entering places where alcoholic beverages are sold. We do not allow the young person with the immature judgment to drive automobiles. They are prohibited from voting. In many States they cannot purchase rifles or other weapons. The statutes and the regulations are legion which make a distinction between the young person and the person with the adult judgment. Why should this come as such a shock when an ordinance attempts to pro-

* See also "For Adults Only"; the Constitutionality of Governmental Film Censorship by Age Classification, 69 Yale L.J. 141 (1959)

tect the young and immature mind from filth and salacious material found in movies that are exhibited to the adult audience?

Not only did this Court recognize that interest in *Jacobellis v. Ohio, supra*, but it directed state and local authorities to a consideration of that interest and suggested that their laws be aimed specifically to objectionable material being disseminated to children, rather than at a total prohibition of its dissemination. Certainly, the Dallas ordinance has attempted to do this in that it has not totally prohibited the dissemination of any material, including movies, to any person, whether adults or children.

Similarly, in *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158 (1944), the Court construed a statute of the State of Massachusetts which prohibited any boys under 12 years and girls under 18 years from selling newspapers, periodicals, or other articles or merchandise, or to exercise any trade, in any street or public place. The statute was attacked on the ground that it violated the First Amendment to the Federal Constitution. In holding the statute valid, the Court pointed out that the State had an interest in the welfare of children, and that a family itself is not beyond regulation in the public interest against claim of religious liberty:

> "But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. Reynolds v. United States, 98 U.S. 145, 25 L. ed. 244; Davis v. Beason, 133 U.S. 333, 33 L. ed. 637, 10 S. Ct. 299. And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as

parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death. People v. Pierson, 176 N.Y. 201, 68 N.E. 243, 63 L.R.A. 187, 98 Am. St. Rep. 666. The catalogue need not be lengthened. It is sufficient to show what indeed appellant hardly disputes, that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent; matters of conscience and religious conviction." (pages 166, 167)

The Court conceded that the legislation might be invalid had it been applied to the sale of such items by adults, but stated that:

"* * * the mere fact a state could not wholly prohibit this form of adult activity * * * does not mean it cannot do so for children. * * *

"The state's authority over children's activities is broader than over like actions of adults. * * * A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impending restraints and dangers, within a broad range of selection. * * *" (page 168)

This restriction upon the First Amendment freedom of religion insofar as it applies to children in the *Prince* case is the same as the classification of movies under the Dallas ordinance.

This same reasoning was followed in *Chemline, Inc. v. City of Grand Prairie*, 364 F. 2d 721 (1966) when an injunction was sought against an ordinance that made it unlawful to exhibit nude or semi-nude pictures on theatre screens within the view of public streets highways. Particular emphasis was put upon its effect upon children as such and a lot of consideration was given to the public interest to be protected as the Court discussed it in these words:

> "It seems to us that the City has followed the suggestion of the Supreme Court and has enacted an ordinance reasonably aimed at preventing the exhibition of objectionable pictures to children.
>
> If there be capacity for evil in a motion picture 'it may be relevant in determining the permissible scope of community control.' Joseph Burstyn, Inc. v. Wilson, 1952, 343 U.S. 495, 502, 72 S. Ct. 777, 780, 96 L. Ed. 1098. As said in American Communications Association, CIO v. Douds, supra, 339 U.S. at 397, 70 S. Ct. at 683: 'When the effect of a statute or ordinance upon the exercise of First Amendment freedoms is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the Nation is an absurdity.' See also Adams Newark Theater Co. v. City of Newark, 1957, 354 U.S. 931, 77 S. Ct. 1395, 1 L. Ed. 2d 1533; Breard v. City of Alexandria, 1951, 341 U.S. 622, 71 S. Ct. 920, 95 L. Ed. 1233; Feiner v. People of State of New York, 1951, 340 U.S. 315, 71 S. Ct. 303, 95 L. Ed. 267; Kovacs v. Cooper, 1949, 336 U.S. 77, 69 S. Ct. 448, 93 L. Ed. 513; Chaplinsky v. State of New Hampshire, 1942, 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031; Cox v. State of New Hampshire, 1941, 312 U.S. 569, 61 S. Ct. 762, 85 L. Ed. 1049." (Page 726)

Even though motion pictures are under the liberty of expression granted by the First and Fourteenth Amendments to the Constitution, there is not a requirement of "* * * absolute freedom to exhibit every motion picture of every kind at all times and all places * * *." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) The Court recognized that motion pictures as and of themselves, can possess a greater capacity for evil, and particularly among the young people of the community, beyond that of other modes of expression. The solemn and compelling interest of the state to protect its youth has been clearly expressed.

Certainly, this Court as late as May of 1967 indicated that the state's concern for the juvenile was, and is, a proper grounds for distinction in the cases. In *Redrup v. New York*, 386 U.S. 767, it made note of the fact that in none of the cases decided therein was there any claim of "a limited and specific concern for juveniles." Surely the Court would not have made this comment unless it could have a bearing on the outcome of the decision. The Court again recognized the distinction as set out in *Prince v. Massachusetts, supra*, and *Butler v. State of Michigan, supra.*

To limit classification, as opposed to censorship, to only those films portraying obscenity beyond any redeeming social value completely ignores the detrimental and damaging effect that sexual promiscuity, abnormal sex relations, extreme brutality and criminal violence or depravity exert upon the immature mind. It can be a disease implanted in young persons. Such a disease once implanted, reflects upon the whole of society and particularly upon the individuals

most closely concerned. It becomes not only a personal problem but a social problem of state and local concern. The words will stand "* * * If there be capacity for evil it may be relevant in determining the permissible scope of community control, * * *." *Burstyn v. Wilson, supra,* (page 502)

The position of the Supreme Court has been one which indicates an acceptance of the concept of "variable obscenity" and a logical follow through of the process of reasoning would likewise grant a classification that varied as to young persons as distinguished from adults. Where the classification did not amount to a total censorship but allowed the showing under protected circumstances there should be no requirement of the test of total obscenity which implies total censorship. Freedom of expression is not denied, nor does the ordinance attempt to restrict the exhibition or distribution of any motion picture. It merely sets forth the requirements as to the conditions under which a young person under the age of sixteen years may view a motion picture classified as "not suitable for young persons." The Dallas ordinance does not attempt to tamper with anyone's work product, nor does it attempt to tread on a person's constitutional right to speak or to make a motion picture, but it merely attempts to protect the young, innocent and immature from exposure to motion pictures that are obviously adult entertainment and have no social value to young persons.

An ordinance such as the Dallas ordinance should not be treated as though it were one which is completely prohibiting the dissemination of material. This is a restraint that is used when obscene material is being dealt with. Considera-

tion should be given to the fact that the protection of young persons is certainly one of the duties and obligations of the state. The gist of the ordinance and the impact of the ordinance is the protection of the young person—it is not a prohibition on the right of free speech as such. It is merely a classification of the material that is being disseminated in such a manner as to allow the parent to make his choice and the state to aid the parent in the protection of the home and of the young person. Did the writers of the Constitution intend that the state could not protect the home? Or even by the requirements of advertising and notification allow the parent to protect his own home? The state has even gone so far as to provide for protection of the young person in a situation where there is no parent available to provide his own protection. Is this reprehensible?

Even if we are dealing with obscenity as such, this Court has seen fit to define it in the terms of "appeal", that is, the appeal to the prurient interest. *Roth v. United States, supra.* For this reason there has been a distinction made between the appeal to one group and the appeal to another group. Photographs that were concededly obscene when judged by "contemporary community standards" were not so when the recipient was the Kinsey Institute for Sex Research.* The recognition between the different types of audiences to which the movie is to be shown, certainly could be a basis for some sort of a meaningful constitutional distinction. This should be so even insofar as any prior restraint or as in the case of the Dallas ordinance, prior classification is con-

* United States v. 31 Photographs, 156 F. Supp. 350 (S.D.N.Y. 1957)

cerned, Children are not the same as adults. In spite of the "heavy burden" insofar as general censorship is concerned, the burden should not be the same insofar as age classification is concerned. This should depend upon "the extent of governmental interest, the magnitude and probability of social harm, and the degree of the restriction on free expression."*

3.

THE DALLAS MOTION PICTURE CLASSIFICATION BOARD AND THE LOWER COURTS APPLIED CONSTITUTIONAL STANDARDS IN CLASSIFYING "VIVA MARIA" AS "NOT SUITABLE FOR YOUNG PERSONS" UNDER THE DALLAS CLASSIFICATION ORDINANCE.

Both the Appellants, Interstate Circuit in Pages 33 to 36 of its brief, and United Artists in pages 25 to 39 and 40 to 48 of its brief, have taken the position that the wrong basis was used by the Board in classifying the movie "Viva Maria" as "not suitable for young persons" and that the lower courts used an improper standard in deciding the case. Both Appellants are basing their argument upon the standard of obscenity used when material is completely suppressed. If it is obscene, there is no constitutional protection. *Roth v. United States, supra.*

As we have pointed out in other parts of our brief, young persons have been denied many privileges in the protection

* "For Adults Only", The Constitutionality of Governmental Film Censorship by Age Classification, supra.

of the public interest that have not been denied to adults. Even First Amendment guarantees have been subject to certain controls insofar as young persons are concerned when they are not subject to the same controls insofar as adults are concerned.

The Court should not lose sight of the fact that the Dallas ordinance does not attempt to suppress any material. It simply provides that if certain motion pictures are found to be "not suitable for young persons" they shall be exhibited and advertised as such. Even in these cases, the young person under the age of sixteen years, accompanied by a parent, guardian, husband or wife may view such a film. Section 46A-4(d) of Ordinance No. 11284 (R. 127).

It appears to us to be significant that this Court has not indicated in the decisions dealing with a prior submission of film, that the party to whom they are submitted must make a specific finding of fact. The rules concerning prior submission in the case of absolute censorship, which were set forth in the *Freedman* case, generally state that the board must assume the burden of showing that the film is unprotected expression; that it must not have an administrative procedure which lends an effect of finality to the determination by the board; the board must either issue the license or go to court to restrain the showing within a brief period of time; and the procedure must insure a prompt final judicial decision. There is nothing in this decision to indicate that there must be any finding made by the board itself. In fact, if such a finding were actually made, it would have no effect upon the trial court because it is the province and the duty

of the trial court to try the case as though no previous finding had been made. Since the burden rests upon the board to prove that the film should be classified as "not suitable for young persons", any previous determination made by it would be nothing more than a self-serving declaration. It appears that this was the feeling of this Court in writing that opinion, to assure that a truly adversary proceeding and a de novo trial is held before the trial court.

At the same time the Court pointed out that there is a model that was set forth in the *Kingsley Books, Inc., supra* case. Reference to that case shows that the model provides that the chief executive officer or chief legal officer of a city, if he thinks a person is about to sell or distribute obscene or indecent magazines or books contrary to the penal laws of the State of New York, may maintain an action for an injunction against such person to prevent the further sale or distribution. The statute itself states:

> "4. In any action brought as herein provided such officer of the city, town or village shall not be required to file any undertaking before the issuance of an injunction order provided for in paragraph two hereof, * * *" (Page 438)

This being true, we submit that the cases referred to by the Appellant, United Artists Corporation on page 40 of its brief are not applicable to this particular situation. Three of those cases dealt with a municipal code of Chicago, which

involved a determination by the Commissioner of Police in the first instance, and then an appeal from his action to the mayor and then to the courts.*

The other case deals with an appeal from a juvenile court which is an entirely different type of proceeding.**

The above cited cases involve the Municipal Code of Chicago authorizing the total suppression of motion pictures on the ground of obscenity. The City of Dallas Motion Picture Classification Ordinance provides for a public hearing for an exhibitor or his designated representative to present evidence in support of his proposed classification. The particular section being Section 46A-3(b) reads as follows:

> "(b) If upon examination of the proposed classification a majority of the Board is not satisfied that it is proper, the Chairman shall direct the exhibitor to project the film before any five (5) or more members of the Board, at a suitably equipped place and at a specified time, which shall be the earliest time practicable with due regard to the availability of the film. The exhibitor, or his designated representative, may at such time make such statement to the Board in support of his proposed classification and present such testimony as he may desire. Within two (2) days, the Board shall make and file its classification on the film in question." (R. 124)

There is testimony in the record showing matters that were considered and found by the Board. It is evidence

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* *American Civil Liberties Union v. City of Chicago*, 13 Ill. App. 2d 278, 141 N.E. 2d 56 (1957); *Capitol Enterprises, Inc. v. City of Chicago*, 260 F. 2d 670 (7th Cir. 1958); *Zenith International Film Corp. v. City of Chicago*, 291 F. 2d 785 (1961)

** *Kent v. United States*, 383 U.S. 541 (1966)

from the testimony of Reverend Maceo, Rector of St. Pauls Episcopal Church in Dallas and a member of the Board, which is as follows:

"Q. Subsequent to this filming of this movie for the purpose of bidding the board to arrive and determine a classification, did the board have a subsequent meeting and discuss the movie?

"A. Yes, they did.

"Q. The full board?

"A. Yes.

"Q. Did the board generally have a lengthy discussion on what proper type of classification which in the judgment of the board should be given this movie?

"A. Yes, I think it was fairly lengthy. I don't believe it was as long as some but longer than the vast majority.

"Q. And the board arrived at the determination that it should be classified as not suitable for young persons?

"A. Yes, they did." (R. 80)

"Q. And in your opinion would this type of movie viewed as a whole have any detrimental effect whatsoever on young people below the age of sixteen years?

"Mr. Hartt: If the Court please, that is not the standard of the ordinance.

"The Court: I will let him answer.

"Mr. Hartt: 'Detrimental' is not a test for the classification of pictures at all and we object to it.

"The Court: I will overrule it.

"Mr. Hartt: Note our exception.

"A. Yes, I do believe it would be.

"Q. Why?

"A. In this sense, that is shows no explicit scenes of sexual intercourse as such but it does imply very clearly that such does occur. I think it does show this, and that the detrimental effect is to show that sexual expression between a man and a woman or any two people of the opposite sex is something that can be entered into without responsibility and continuing commitment, that it equates [fol. 102] sexual feeling and expression with the word 'love,' that—

"Mr. Hartt: If the Court please, if he would slow down, I'd like to note it.

"The Court: Sir?

"Mr. Hartt: If he would slow down I'd appreciate it so we can make some notes on this.

"The Court: Well, I can't control his modulation. Proceed, Reverend.

"A. The scenes of the relationship between Miss Bardot and various men in the movie, as well as between Miss Moreau and at least one man in the movie, indicates that the attraction between the man and the woman is something which is to be fulfilled almost upon first meeting; that there is no evidence of true affection and continuing responsibility between the people. It implies that people can meet, see each other, and immediately, without too much other duration of time or of exchange of personal responsibility and commitment, can enjoy each other sexually, part, and therefore no harm. As a matter of fact, this is all a matter of one of the joys of life and is great, is magnificent, is wonderful, as such, and I think this type of relationship is not true and that it is misleading and shows it as acceptable and approved behavior.

"Q. In your judgment, what this picture portrays is directly contrary to our accepted moral standards?

"A. Yes, it is.

"[fol. 103] Q. I believe the gist of your testimony then with reference to this then is it does portray sexual promiscuity in such a manner which is likely to encourage juvenile delinquency?

"Mr. Hartt:: We object to leading and putting words in the witness' mouth.

"The Court: I will let him—

"Mr. Hartt: He is fixing to read from the ordinance. He can tell his opinion about what it is without being read.

"The Court: Overrule it.

"Mr. MacMaster: He was objecting because we weren't following the ordinance a while ago.

"Q. Encourage juvenile delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest?

"A. Yes. I think this movie would lead to their sexual promiscuity, that it could.

"Q. Then in your judgment this violates this standard set in the ordinance I have just read?

"A. Yes, I do." (R. 80, 81, 82)

As further evidence before the court, the testimony of Mr. Gilliland is as follows:

"Q. Were there any scenes in the movie that portrayed the women disrobing the men?

"A. One scene involved that sort of thing. This is the one mentioned earlier where the hero of the revolution was chained up in the jail and Maria No. 2—there was a strong man in the movie—Maria No. 2 started rattling the bars because she wanted to get in to see her hero and the strong man parted the bars for her. She went in, embraced him, they spoke,—I don't remember what they said particularly,—but she

tore his shirt off to the waist, and as far as disrobing goes, that is all she did to him. I think she tore her shirt off partially, or wholly off maybe.

"Q. Was there any indication that she disrobed him any further or any hint of it or any such thing as that?

"A. Well, there was some indication. The camera, of course, did not allow any particular view.

[fol. 91] Q. This was the part left to the imagination, if any, is that right?

"A. I'd say so, yes, sir.

"Q. Were there any scenes of seduction in the movie, as you recall?

"A. Seduction. At this time I don't remember if there were any such scenes or not.

"Q. Was the general—What was the general tenor of the movie so far as sex was concerned, in your opinion?

"A. It was a strain that was carried throughout the movie, I think. Regardless of what happened, it was one of these things that was still there, still present.

"Q. Well, what type of sex?

"A. Well, as I said before, from start to finish it was a loose sort of conduct, we will say, promiscuous sort of thing.

"Q. Was it portrayed in the sense of being acceptable?

"A. Very much so.

"Q. Portrayed in the sense of being desirable?

"A. Very much so." (R. 72, 73)

Mr. Gilliland was a member of the Board and this testimony indicated the basis on which the Board was making its finding. The Appellant United Artists Corporations, on page

47 of its brief, attempted to indicate that Mr. Gilliland was not qualified as a witness because his only qualification was that he was the father of two children. This is a misstatement. Mr. Gilliland is also an attorney who at the time had been practicing law approximately six years (R. 44). As such he could have been elected to the district court bench and could have been the judge who made the final decision in this matter. Certainly if this does not qualify him, then it is the equivalent to saying that the judge who sits as the court to try the case is not qualified to make such a determination.

Even if we were to assume, which we certainly do not, that the ordinance as applied to the movie "Viva Maria" was improperly applied—if we were even to assume arguendo that the Board or the trial court applied the wrong test, this within itself would have no bearing on the constitutionality of the ordinance as such. It would be controlling only insofar as the application of the ordinance to that movie. This is the sum total of the argument of the Appellants when they state that, in their opinion, the ordinance as applied by the Board and the lower court imposed an unconstitutional restraint on the exhibit of the motion picture "Viva Maria"

III.

WHEN THE EFFECT ON THE FIRST AMENDMENT FREEDOM IS MINIMAL AND THE PUBLIC INTEREST IN PROTECTING YOUNG PERSONS IS SUBSTANTIAL, THE CASE SHOULD BE DECIDED ON THE BALANCING TEST.

(1) The City of Dallas Ordinance No. 11284 is a narrowly drawn ordinance and is directed toward a particular segment of our society. It falls within the permissible restraint doctrine enunciated by this Court. The way to come to grips with this problem in the application of this ordinance is to begin with the basic premise enunciated by this Court in the case of *Breard v. Alexandria*, 341 U.S. 622 (1951) which involved an ordinance of the City of Alexandria, Louisiana, prohibiting canvassers and peddlers from calling upon the occupants of private residences without having been requested or invited to do so. The Court held that the ordinance did not violate the First Amendment on freedom of speech or the due process clause of the Fourteenth Amendment by imposing an unreasonable restraint on the right to engage in a legitimate occupation. It will also be noted that the Court in that case also held that freedom of speech or press does not mean that one can talk or distribute where, when and how one chooses; but the right to do so must be adjusted to the rights of others, the Court saying at page 642:

> "The First and Fourteenth Amendments have never been treated as absolutes. Freedom of speech or press does not mean that one can talk or distribute where,

> when and how one chooses. Rights other than those of the advocates are involved. By adjustment of rights, we can have both full liberty of expression and an orderly life."

(2) This same balancing of the private and public interests was forcibly stated in *American Communications Association v. Douds*, 339 U.S. 382, 397 (1950):

> "* * * When the effect of a statute or ordinance upon the exercise of First Amendment freedoms is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the Nation is an absurdity. * * *"

This Court has apparently subscribed in the past to the doctrine that every freedom carries with it a concomitant responsibility. The freedom is that of the individual. The reponsibility is his debt to society in return for the freedom. This is still sound doctrine.

(3) This Court has in a number of cases applied the balancing test where the security interest of the state outweighed the private rights of individuals or associations who claimed infringement of rights under the First Amendment. For example, the Court sustained the right of the sub-commmittee of the House Committee on Un-American Activities to make inquiries into witnesses' past and present membership in the Communist Party, by holding that this did not offend the First Amendment. *Barenblatt v. United States*, 360 U.S. 109 (1959), reh. den. 361 U.S. 854; *Wilkinson v. United States*, 365 U.S. 399 (1961) reh. den. 365 U.S. 890; *Braden v. United States*, 365 U.S. 431 (1961), reh. den. 365 U.S. 890.

(4) The Court reached the same conclusion in a number of cases in holding that the security interests of a state were sufficiently compelling to outweigh the associational privacy of persons who attend a summer camp which a state legislative investigating committee had valid reason to believe might have had subversive persons as speakers and guests. *Uphaus v. Wyman*, 360 U.S. 72 (1959), reh. den. 361 U.S. 856.

(5) The registration and disclosure provisions of the Subversive Activities Control Act (50 USC § 786) requiring foreign-dominated Communist-action organizations to reveal the names and addresses of their officers and members, as well as a list of all printing presses in their possession and control, and also requiring a finincial account, was held by this Court not to be in violation of the First Amendment. *Communist Party of United States v. Subversive Activities Control Board*, 367 U.S. 1 (1961) reh. den. 368 U.S. 871.

(6) The Smith Act (18 USC § 2385) making it a felony to hold active membership in an organization which advocates the overthrow of the government by force or violence, by application of the balancing test, was held to be valid. The Court held that it was necessary to deal with the evils which Congress has a right to prevent and the Act did not restrict freedom of association more than was necessary to deal with this evil. *Scales v. United States*, 367 U.S. 203 (1961) reh. den. 366 U.S. 978.

(7) This Court also applied the balancing test in the case of *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961), reh. den. 368 U.S. 869; *Re Anastaplo*, 366 U.S. 82 (1961) and *Kovacs v. Cooper*, 336 U.S. 77. *Konigsberg* (1949) held that a state may deny an application for admission to the Bar on the ground that by refusing to answer questions relating to the applicant's membership to the Communist Party the applicant has obstructed the bar examining committee's required investigation into his qualifications. The state's interest in having lawyers who are devoted to the law in its broadest sense, is sufficient to outweigh the minimal effect upon free association occasioned by compulsory disclosure.

The ordinance involved in the case at bar, when viewed in the light of the balancing test as illustrated in the cases cited above, clearly has a minimal effect on any claim by the movie exhibitor or producer that its application is not constitutionally permissible. As heretofore pointed out the interest of the state in the welfare of the children clearly outweighs any right of an exhibitor or producer of a movie film to profit from a so-called freedom to the child's detriment. Therefore it is respectfully submitted that this Court should hold the ordinance to be constitutional in the face of the claim that its application results in a burdensome prior restraint:

(1) On the ground that the result can easily be reached by the balancing test; and

(2) That the producer or exhibitor is afforded a prompt final judicial review under the varied provisions of the ordinance;

as was held by the Court of Civil Appeals of Texas, as well as the United States Court of Appeals for the Fifth Circuit.

IV.

CONCLUSION

Based upon the foregoing reasons, Appellee prays that said judgment of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas be affirmed.

Respectfully submitted,

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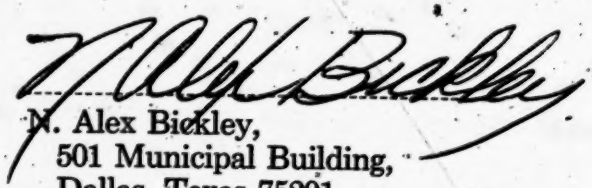
CERTIFICATE OF SERVICE

A copy of this Brief has been served upon Mr. Dan McElroy and Mr. Paul Carrington, attorneys for Appellant-Intervenor, United Artists Corporation, by delivering the same to them in their offices located at 1900 Mercantile Dallas Building, Dallas, Texas, and Mr. Grover Hartt, Jr., and Mr. Edwin Tobolowsky, attorneys for Appellant, Interstate Circuit, Inc., by delivering the same to them at their offices located at 3525 Southland Center, Dallas, Texas



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